evidence the learned judge considered the omission to notify the Johor Chamber as fatal. We respectfully agree with him. Our answer to the second issue is also in the negative.

The learned judge declined to decide on the third and fourth issues because he considered that the matters did not arise because of his answer to the second issue. We agree that the third and fourth issues need not be answered because they are academic in the circumstances. The fifth issue has been answered in the positive.

The appeal is accordingly dismissed.

The Federal Chamber had appealed against the judgment of the learned judge because all the three questions answered by him were in the negative whereas in this judgment three of the four questions are answered in the positive in favour of the appellants except on the question of the invalidity of the amended Article 26(2) of the Constitution. In the circumstances it has now been agreed to by the parties that there will be no order as to costs here and below.

Liberty to apply for consequential orders. Deposit to be refunded to appellants.

Order accordingly.

Order accordingly.

Solicitors: *Tunku Zuhri, Manan & Abdullah; Reginal Vallipuram & Co.*

ADZMI BIN ALI & ANOR. v. MOHAMED ISA BIN KASAD

[S.C. (Seah, Hashim Yeop A. Sani & Wan Hamzah S.C. JJ.) September 24, 1986 & January 10, 1987]

[Kuala Lumpur – Supreme Court Civil Appeal No. 277 of 1986]

Practice and Procedure – Claim for damages for personal injuries following road accident – Appearance not entered – Default judgment entered with damages to be assessed – Application to set aside interlocutory judgment dismissed – Damages assessed – Judgment for damages and costs – Subsequent application to set aside interlocutory judgment and judgment for damages – Application dismissed – Appeal – R.H.C. 1980, Orders 13, 18 & 37 – Courts of Judicature Act, 1964, s. 68(1)(a).

In this case the respondent had taken out a writ against the appellants claiming damages for personal injuries and pecuniary losses following a motor accident. The appellants did not enter appearance and default judgment was entered against them with damages to be assessed. The appellants applied by summons in chambers to set aside the interlocutory judgment but the application was dismissed. Subsequently the damages were assessed and judgment entered for the charges and costs. The appellants then applied by notice of motion to set aside the interlocutory judgment and the judgment for damages and costs and for leave to defend the action. The application was dismissed and they appealed.

Held: (1) when an aggrieved party was dissatisfied with the decision of the learned judge to set aside a default judgment [final judgment under Order 13 rule 1(1) or an interlocutory judgment with damages to be assessed under Order 13 rule 2] the proper procedure to be followed was by way of appeal to the Supreme Court subject to the provisions of section 68(1)(a) of the Courts of Judicature Act, 1964;

(2) in this case when the notice of motion was set down for hearing the learned judge should have dismissed it on the ground that he was *functus officio.*

Cases referred to:

(1) *Evans* v. *Bartlam* [1937] A.C. 473.
(2) *Hock Hua Bank Bhd.* v. *Sahari bin Murid* [1981] 1 M.L.J. 143.
(3) *Re VGM Holdings Ltd.* [1941] 3 All E.R. 417

SUPREME COURT.

G. Sri Ram (*C. Sri Kumar* with him) for the appellants.

B.S. Sidhu for the respondent.

Cur. Adv. Vult.

Seah S.C.J. (delivering the Judgment of the Court): This was an appeal against the dismissal of an application by the appellants (defendants in the court below) to set aside the interlocutory judgment in default of appearance dated March 15, 1985, as well as a judgment assessing damages in the sum of $241,032.00 dated June 15, 1985. We think we ought to allude to the relevant facts.

The respondent (plaintiff in the court below) took out a writ against both the appellants claiming damages for personal injuries and pecuniary losses following a motor accident which took place on July 4, 1983. When the appellants did not enter an appearance after having been duly served with the writ and the statement of claim default judgment was entered against them on March 15, 1985, with damages to be assessed. On May 16, 1985, the appellants applied by summons-in-chambers for the interlocutory judgment in default of appearance to be set aside. The application was

supported by an affidavit affirmed by one Ahmad Sukarno bin Abdullah Nawawi. After hearing the oral submissions of learned counsel for the appellants and the respondent the learned judge dismissed the application with costs to be taxed on June 7, 1985. There was no appeal against this Order.

On June 15, 1985, damages were assessed in the total sum of $241,032.00 and judgment was accordingly entered in favour of the respondent against both the appellants with costs. Notice of appeal against this judgment was lodged on July 9, 1985, vide Supreme Court Civil Appeal No. 232 of 1985.

However, on September 19, 1985 the appellants took out a Notice of Motion for the interlocutory judgment in default of appearance dated March 15, 1985, and the judgment dated June 15, 1985, to be set aside and that leave be given to them to defend the action. This application was supported by seven affidavits affirmed by (1) C. Sri Kumar, (2) Shanmuganathan s/o Thambiah, (3) Atwi bin Munawar, (4) Asmuni bin Malik, (5) Sgt. Detective Mohd. Nor bin Muhamad and (6) Ahmad Sukarno bin Abdullah Nawawi and (7) C. Sri Kumar. On July 3, 1986, the learned judge dismissed the motion with costs to the respondent to be taxed. The appellants filed notice of appeal against the decision of the learned judge on July 21, 1986, vide Supreme Court Civil Appeal No. 277 of 1986. By consent it was agreed by learned counsel for the appellants and the respondent that Supreme Court Civil Appeal No. 277 of 1986 be heard first and that the other appeal be stood down.

Learned counsel for the appellants had submitted that since the relief claimed in the Notice of Motion was different from that claimed in the summons-in-chambers the appellants were entitled to make the second application. In the summons-in-chambers the appellants applied for the default judgment to be set aside and that they be allowed to file a statement of defence; whereas in the Notice of Motion they applied for both the interlocutory judgment in default of appearance and the judgment in default of appearance and the judgment assessing the damages in the total sum of $241,032.00 to be set aside and that they be granted leave to defend the action. In our judgment there was no merit in this submission.

Now, when a defendant fails to enter an appearance to a writ for an unliquidated sum, the plaintiff may enter *interlocutory* judgment against him for damages to be assessed [see Order 13 Rule 2 of the Rules of the High Court 1980]. On the other hand, if the claim of the plaintiff is for a liquidated amount and the defendant defaults in entering an appearance within the specific time, *final* judgment for the sum claimed may be entered against him [see Order 13 Rule 1(1)]. The Court may, on such terms as it thinks just, set aside or vary any judgment entered in pursuance of this Order [see Order 13 Rule 8]. In our opinion, the word "judgment" in Order 13 Rule 8 means a "final" judgment under Order 13 Rule 1(1) or an "interlocutory" judgment under Order 13 Rule 2 thereof. The term "interlocutory" judgment means that such a judgment is interlocutory only as to amount and is final as to the right of the plaintiff to recover damages. Support for such a construction may be gathered from the speeches of the Law Lords in the case of *Evans* v. *Bartlam*[1] where their Lordships held that if the default judgment was obtained regularly then there must be an affidavit of merits, meaning that the applicant/defendant must produce to the court evidence that he has a *prima facie* defence.

In our opinion, assessment of damages is regulated by Order 37 and when damages have been assessed it becomes a final judgment. On the facts of this case, if the appellants by the Notice of Motion were relying on Order 18 Rule 8 to set aside the final judgment dated June 15, 1985, they must fail because of the doctrine of *functus officio* in view of the dismissal of their earlier application by the summons-in-chambers for setting aside the interlocutory judgment.

In our opinion, when an aggrieved party was dissatisfied with the decision of the learned judge to set aside a default judgment [final judgment under Order 13 Rule 1(1) or an interlocutory judgment with damages to be assessed under Order 13 Rule 2] the proper procedure to be followed was by way of appeal to the Supreme Court subject to the provisions of section 68(1)(a) of the Courts of Judicature Act 1964. The authority for this view is *Evans* v. *Bartlam (supra)*.

Now, when the Notice of Motion was set down for hearing the learned judge should have dismissed it on the ground that he was *functus officio*. For authority of this proposition see the Federal Court case of *Hock Hua Bank Bhd.* v. *Sahari bin Murid*[2] and *Re VGM Holdings Ltd.*[3] We therefore concur with the learned judge that the motion be dismissed with costs to the respondent but for different reasons.

It follows that the appeal be dismissed with costs to the respondent. The deposit be paid to the respondent on account of taxed costs.

Appeal dismissed.

Solicitors: *Sri Ram Zukifly & Kumar; B.S. Sidhu & Co.*

YANG YAP FONG & ANOR. v. LEONG PEK HOON & ANOR.

[S.C. (Lee Hun Hoe C.J. (Borneo), Wan Suleiman & Syed Agil Barakbah S.C. JJ.) October 15, 1986 & January 10, 1987]

[Kuala Lumpur – Supreme Court Civil Appeal No. 222 of 1986]

Torts – Negligence – Road accident – Damages – Future loss of earning capacity – Evidence of likelihood to obtain employment and that injury will affect his earning capacity.

Damages – Future loss of earning capacity.

In this case the first appellant was injured when the motorcycle on which he was a pillion rider met with an accident with a motor car which was driven by the first respondent as the servant or agent of the second defendant. The first appellant was 13 years old at the time of the accident and the suit was filed by his father and next friend the second appellant. The respondents admitted full liability for the accident and the learned judge having heard evidence on the quantum of damages awarded in favour of the appellants the sum of $32,775.00 as general damages and $4,181.50 as special damages with interest and costs. The appellants appealed and on the appeal argued that the first appellant was entitled to an award for future loss of earning capacity in view of the serious injuries sustained by him. He sustained the following injuries:

1. Compound fracture of the right femur.
2. Fracture of the left clavicle.
3. Compound fracture of the right tibia and fibula resulting in 2 cm shortening to the right leg.
4. Supramalleolar fracture of the right ankle resulting in foot drop.

According to the medical expert evidence the changes in the right ankle joint will be likely to aggravate in the next 5 or 10 years. The learned judge held that the appellant was not entitled to any future loss of earning capacity, but he awarded out of a desire to assist him the sum of $1,800/– as loss of prospective earnings during hospitalization and recuperation and not as loss of future earnings or loss of earning capacity. He assessed the award at $200/– a month for a period of nine months.

Held, allowing the appeal: (1) the award of $1,800/– appeared to be pre-trial loss of earnings which the appellant was not entitled to claim being unemployed at the material time;

(2) the learned Judge erred in refusing to make any award for future loss of earning capacity. There was more than sufficient evidence of the likelihood that the appellant will be able to obtain employment and that in five or ten years the injury to his right ankle will aggravate with osteoarthritis setting in and increasing as he grows older and will thereby affect his earning capacity;

(3) the Court awarded him $12,000 for future loss of earning capacity based on a loss of income of about $100 a month for fourteen years;

(4) the award of $1800/– should be set aside.

Cases referred to:

(1) *Ngooi Ku Siong & Anor.* v. *Aidi Abdullah* [1985] 1 M.L.J. 30.

(2) *Moeliker* v. *A. Reyrolle Ltd.* [1977] 1 All E.R. 9.

(3) *Cook* v. *Consolidated Fisheries Ltd.* [1977] I.C.R. 635, 639.

(4) *Yang Salbiah & Anor.* v. *Jamil bin Harun* [1981] 1 M.L.J. 292.

SUPREME COURT.

Khoo Eng Chin (*A.C. Vohrah* with him) for the appellant.

S.K. Sivam for the respondent.

Cur. Adv. Vult.

Syed Agil Barakbah S.C.J. (delivering the Judgment of the Court): This appeal relates to an accident claim for damages by the first appellant/plaintiff who was injured when the motorcycle on which he was a pillion rider and which was being ridden by one Hong Pau Kong met with accident with a motorcar which was driven by the first respondent as servant or agent of the second respondent. The first appellant was thirteen years old at the time of the accident and the suit was filed by his father and next friend, *i.e.* the second appellant. He was already an adult at date of the hearing.

In the Court below, the question of liability was not an issue since the respondents admitted full liability for the accident. The learned Judge having heard evidence on the quantum of damages, awarded in favour of the appellants the sum of $32,775.00 as general damages and $4,181.50 as special damages with interest and costs. The appellants were not satisfied with the award for general damages alleging that the amount was insufficient and manifestly inadequate. They appealed at first on four grounds, but abandoned the first three